UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ANDREW JACKSON,	:	
Petitioner,	:	
	:	Civil Action No. 3:02CV1739(CFD)
v.	:	
	:	
JOHN ASHCROFT, Attorney General	:	
of the United States,	:	
Respondent.	:	

RULING

Pending is the petitioner's Petition for Habeas Corpus and Stay of Removal [Doc. #1]. Although the petition does not so indicate, it appears that it was filed pursuant to 28 U.S.C. § 2241. For the following reasons, the petition is DENIED.

I. Background

Petitioner Andrew Jackson is a citizen of Jamaica and entered the United States in 1975. He was arrested on December 4, 1991 as the result of a robbery committed on November 26, 1991. After pleading guilty in the Connecticut Superior Court to Robbery in the First Degree, in violation of Conn. Gen. Stat. § 53a-134, Jackson was sentenced on February 11, 1993 to twelve years' imprisonment, suspended after eight years, and three years of probation.[1]

Based on the conviction for robbery, the Immigration and Naturalization Service ("INS") initiated removal proceedings against Jackson, serving him with an Order to Show Cause on December

[1]Jackson also received a concurrent sentence of one year imprisonment for an additional conviction of Larceny in the Fourth Degree, in violation of § 53a-125, arising out of the same conduct as the robbery conviction. He has been continuously incarcerated since his arrest on December 4, 1991.

4, 1995. See 8 U.S.C. § 1227(a)(2)(A)(iii) (providing for deportation of aliens convicted of an aggravated felony); 8 U.S.C. § 1101(a)(43) (defining "aggravated felony").

On July 22, 1997 Jackson was transferred from state custody to the INS in order to conduct removal proceedings. On September 17, 1997, an Immigration Judge ("IJ") found Jackson deportable. The IJ also found that Jackson was ineligible for relief under former § 212(c) of the INA. See 8 U.S.C. § 1182(c) (indicating that the section was repealed in 1996).[2] Jackson appealed the decision of the IJ to the extent it found him ineligible for § 212(c) relief, and his appeal was rejected by the Board of Immigration Appeals ("BIA") on November 18, 1998. In December of 1998, Jackson filed a petition for a writ of habeas corpus in the U.S. District Court in Connecticut. The parties jointly requested that the petition be remanded to the BIA in light of Henderson v. INS, 157 F.3d 106 (2d Cir. 1998), in which the Second Circuit held that the Anti-Terrorism Effective Death Penalty Act (AEDPA) provision that repealed § 212(c) of the INA did not apply retroactively to individuals whose deportation proceedings began prior to AEDPA's effective date of April 24, 1996. See Henderson, 157 F.3d at 130.[3]

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[2]The parties do not directly address the reasoning of the IJ. Jackson apparently believed that he was held ineligible for § 212(c) relief because the IJ applied AEDPA's repeal of § 212(c) retroactively. While Henderson v. INS, 157 F.3d 106 (2d Cir. 1998) overruled that approach, the IJ could still have appropriately found Jackson ineligible for § 212(c) relief on the basis that he had served more than five years for an aggravated felony. See discussion infra.

[3]The parties dispute the date on which the proceedings "commenced" for purposes of applying Henderson's holding regarding retroactivity. The government claims that proceedings began on March 26, 1997, when the Order to Show Cause was filed in Immigration Court, after the AEDPA became effective. Jackson claims proceedings began on December 4, 1995, before AEDPA's effective date. Because the Court's holding does not turn on Henderson's retroactivity holding, the Court need not resolve this controversy.

On remand, the BIA granted Jackson's request for reconsideration in light of Henderson and remanded the matter to an IJ. On October 16, 2001, the IJ denied Jackson's petition for § 212(c) relief, holding that he was ineligible because he had served more than 5 years in prison. The BIA dismissed the subsequent appeal on September 5, 2002.

Jackson filed this action on October 1, 2002, arguing that, but for the allegedly erroneous decision of the IJ on September 17, 1997 (and the BIA's affirmation thereof), he would have been eligible for § 212(c) relief. In other words, Jackson argues, since he had not served five years on his Connecticut sentence at that time, if the IJ had ruled properly he would have been eligible for § 212(c) relief then.

II. Discussion

At the time of Jackson's guilty plea in 1993, section § 212(c) of the INA provided that

> Aliens lawfully admitted for permanent residence who temporarily proceed abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General . . . The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such a felony or felonies a term of imprisonment of at least five years.

8 U.S.C. § 1182(c) (repealed 1996). The language excluding relief for aliens who have served five or more years for aggravated felonies was added to the statute in 1990 and became effective in November of 1990, approximately one year before Jackson committed the offenses leading to the deportation order. On its face, § 212(c) applies only to aliens convicted of criminal offenses rendering them excludable. However, the Second Circuit has held that § 212(c) relief is available to aliens subject to deportation under § 241(a) in some circumstances:

> Former § 212(c) by its terms provided relief only from "exclusion," and made no mention of relief from deportation. 8 U.S.C. S 1182(c) (1994) . . .
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> In Francis v. INS, 532 F.2d 268 (2d Cir.1976), we extended § 212(c) discretionary relief, which was previously available only to aliens subject to exclusion under § 212(a), 8 U.S.C. S 1182(a), to aliens (such as [petitioner]) who were subject to deportation under § 241(a), 8 U.S.C. S 1251(a) (1994) (current version at 8 U.S.C. S 1227(a) (2000)). Francis, 532 F.2d at 272-73; see also, e.g., St. Cyr, 229 F.3d at 410; Cato v. INS, 84 F.3d 597, 599 (2d Cir.1996). However, because § 212(c) relief from deportation arose as a judicial extension of that section's provision for relief from exclusion, we held that in order for an alien to be eligible to apply for § 212(c) relief from deportation, an alien's deportable offense under § 241(a) must be analogous to a ground of "exclusion" contained in INA § 212(a). See Bedoya-Valencia v. INS, 6 F.3d 891, 894 (2d Cir.1993). Thus, a § 212(c) waiver is available in a deportation proceeding only "if the reason for deportability [under § 241(a)] is 'substantially equivalent' to a ground of exclusion listed in § 212(a)." Cato, 84 F.3d at 599 (quoting Bedoya- Valencia, 6 F.3d at 894 (emphasis added)).
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> In Bedoya-Valencia we recognized an additional category of eligibility for § 212(c) relief--relief for aliens whose ground for deportation under § 241(a) could not possibly be analogous to a ground for exclusion under § 212(a) because of the inherent differences between deportation and exclusion. See Bedoya-Valencia, 6 F.3d at 897 (holding that, "[a]t least with respect to entry without inspection, a ground of deportation that could not conceivably have such an analogue, there is no basis in statutory text or legislative purpose to preclude [this] modest extension of the Francis rule.").
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> Thus, as we later summarized in Cato, an alien subject to deportation under § 241(a) could fall into one of only three categories in terms of the availability vel non of § 212(c) relief:
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> > (1) The deportee's ground of deportation [is] congruent with a ground of exclusion listed in § 212(a). Such a deportee is eligible for § 212(c) relief.
> > (2) The deportee's ground of deportation [is] one that could not possibly be analogous to a ground of exclusion. Such a deportee is also eligible for § 212(c) relief.
> > (3) The deportee's ground of deportation [is] one that could conceivably have an analogous ground of exclusion under § 212(a) but ... Congress has not chosen to include that ground in § 212(a). Such a deportee is *not eligible* for § 212(c) relief.
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> Cato, 84 F.3d at 600 (emphases added).

Drax v. Reno, 338 F.3d 98, 107-08 (2d Cir. 2003). See also, 8 C.F.R. 212 (1991) (implementing regulations applying § 212(c) in deportation proceedings).

The parties have not addressed which of the above categories applies to an individual found deportable pursuant to § 241(a)(2)(A)(iii) for commission of an aggravated felony. However, even assuming that a petitioner found deportable under that section prior to 1996 could be eligible for § 212(c) relief, the government has asserted a separate ground on which Jackson is barred from seeking such relief here. The government argues that "[b]y the time of his release to INS custody on July 22, 1997, and well before even the first administrative deportation hearing in this case, he had served more than five years in prison [on the robbery conviction]."

Jackson does not dispute that he was in state custody continuously from his state arrest on December 4, 1991 until he was transferred to INS custody on July 22, 1997–a period exceeding 5½ years, or that First Degree Robbery qualifies as an "aggravated felony." Rather, Jackson claims that in calculating time "served" for the purposes of § 212(c), periods of pre-trial detention that are later credited to the sentence are not to be counted. Jackson has cited an unpublished district court decision for this proposition. See Lara v. INS , No. 3:00cv24 (D. Conn. Nov. 30, 2000) (unpublished opinion).

The government claims that the Second Circuit decision in Buitrago-Cuesta v. INS, 7 F.3d 291(2d Cir. 1993) controls the outcome here, and that it establishes that the 5-year period for § 212(c) eligibility runs from the date that the pretrial incarceration begins (if that time is later credited to the sentence) through the date of the IJ's final decision. Buitrago-Cuesta does make it clear that the 5-year period is to be gauged at the time of the IJ's decision. See Buitrago-Cuesta, 7 F.3d at 295-96. Thus, here, the question of Jackson's eligibility for § 212(c) relief turns on whether he had served five years for his robbery conviction at the time of the IJ's determination of deportablility on September 17, 1997.

However, a fair reading of Buitrago-Cuesta indicates that the Second Circuit did not consider the specific issue of whether pretrial detention credited to a sentence counts as "time served" under the statute for purposes of the 5-year bar. In Buitrago-Cuesta, the petitioner's pretrial detention began on March 7, 1986 and judgment was entered on July 3, 1986. At the first hearing before an IJ, held on June 18, 1991, the petitioner indicated his intent to seek a discretionary waiver under §212(c) (he submitted a written application on June 27, 1991.) The Court held, however, that the controlling date for purposes of the § 212(c) 5-year period is the date of the IJ's decision, not the date of the petitioner's first request for § 212(c) relief. The IJ had made the final deportation decision on August 2, 1991–a date that was more than five years from the date of the petitioner's arrest *and* his guilty plea, thereby rendering him ineligible for §212(c) relief whether the period of pretrial detention was counted or not. The Court was not specific about when the 5 year clock began to run.[4]

At least one other Court to have directly considered the question of whether pretrial detention counts toward the expiration of the five-year period has concluded that such time should be counted:

> Under BIA precedent, pretrial confinement counts towards the accumulation of time served for various statutory provisions, see Matter of Valdovinos, 18 I & N. Dec. 343, 344-45 (BIA 1982) (pretrial time served credited in determining whether alien had

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[4]At one point the Court states that "[t]he BIA affirmed the immigration judge's finding that [petitioner] had served a term of imprisonment of at least five years, rendering him ineligible for § 212(c) relief, *as of July 3, 1991* [i.e., 5 years from the date of judgment]. We agree with the BIA." Buitrago-Cuesta, 7 F.3d at 296 (emphasis added). This passage seems to suggest that pretrial detention does not count toward the five year period. But, in the next paragraph, the Court notes that "the immigration judge properly considered *all the time [petitioner] spent in prison* as of August 2, 1991, the date of his decision," seemingly endorsing the government's view that pretrial detention counts toward § 212(c)'s five-year limitation.

> served 180 days under 8 U.S.C. S 1101), and the Second Circuit's decision in Buitrago-Cuesta further supports this counting method, as it held that the immigration judge "properly considered all the time Buitrago spent in prison" as of the date of his decision.

Mezrioui v. INS, 154 F. Supp. 2d 274, 277 (D. Conn. 2001).[5]

Jackson argues here that, "[e]ven if [Buitrago-Cuesta] were relevant to this case, its holding has been limited" by St. Cyr v. INS, 229 F.3d 406. However, as the Mezrioui Court has noted, St. Cyr did not alter Buitrago-Cuesta to the extent that it addressed the 5-year time limit under § 212(c):

> Mezrioui argues that Buitrago-Cuesta is no longer good law after the Second Circuit's decision in St. Cyr v. INS, 229 F.3d 406 (2d Cir.2000). The pertinent part of the St. Cyr decision, however, questioned whether Buitrago-Cuesta's discussion of retroactivity principles had been altered by subsequent Supreme Court precedent. Id. at 420. . . . The portion of Buitrago-Cuesta concluding that time served in prison during the course of a 212(c) hearing counted towards the five year ban for purposes of determining eligibility for a 212(c) waiver is still good law.

Id. at 278. Finally, to the extent that Buitrago-Cuesta is ambiguous on the question of when the 5-year clock begins for purposes of § 212(c) relief, this Court agrees with the reasoning of Mezrioui, that to the extent Jackson "gets credit against his sentence for pretrial time served pursuant to Conn. Gen.Stat. § 18-98d, logic suggests that those same periods should be included in the calculation for purposes of determining whether petition has served five years imprisonment and is thus ineligible for 212(c) relief." See id. at 277, fn.2.

Thus, the five-year period of § 212(c) eligibility began to run on the date that his pretrial

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[5]The fact that this counting method aligns with BIA precedent is particularly important since "[w]hen reviewing a determination by the BIA, the Second Circuit has instructed lower courts to 'accord substantial deference to the [BIA's] interpretations of the statutes and regulations that it administers.'" Mezrioui, 154 F. Supp. 2d at 278 (citing Michel v. INS, 206 F.3d 253, 262 (2d Cir.2000)).

incarceration began, on December 4, 1991. Jackson's eligibility for § 212(c) relief therefore expired on December 5, 1996–the day that his period of imprisonment exceeded 5 years. Even assuming that Jackson is correct that the "end date" should be September 17, 1997 when the IJ initially determined that he was deportable, it was after the five year period expired.

Jackson also argues, though, that his removal proceedings began on December 4, 1995 with the issuance of the charging document. Since that was before the expiration of the 5 year period, Jackson maintains that it was error for the IJ to have concluded that he was not eligible for § 212(c) relief when he entered his order on September 17, 1997. However, the law is clear that in calculating § 212(c), courts are to include the time spent in prison during the course of a hearing. See Buitrago-Cuesta, 7 F.3d at 296 ("Just as we credit aliens for time spent in the country while an appeal is pending before the BIA so that they are eligible for § 212(c) relief, we will also consider the time aliens spend in prison during the course or a hearing for purposes of rendering them ineligible for § 212(c) relief."). Therefore, it was appropriate for the IJ to consider not just the time Jackson spent in prison from the date his pretrial incarceration began until the charging document was filed, but the entire period of his incarceration through the time of his decision on September 17, 1997. Because Jackson had served more than five years within the meaning of § 212(c) by the time of the IJ's initial decision, he was no longer eligible for § 212(c) relief.

For the foregoing reasons, the petition for habeas corpus and stay of removal is DENIED.

SO ORDERED this _____ day of September 2003, at Hartford, Connecticut.

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CHRISTOPHER F. DRONEY

UNITED STATES DISTRICT JUDGE